

Letter of Findings: 04-20110042
Sales and Use Tax
For the Years 2007, 2008, 2009

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ISSUE

I. Sales and Use Tax – Consignment Sales of Watercraft and Boating Equipment.

Authority: IC § 6-2.5-1-2; IC § 6-2.5-2-1; IC § 6-2.5-3-2; IC § 6-2.5-3-4; IC § 6-2.5-3-6; IC § 6-2.5-4-12; IC § 6-8.1-5-1; IC § 6-2.5-9-3; IC § 9-31-3-1; IC § 9-31-3-3; [45 IAC 2.2-4-33](#); Sales Tax Information Bulletin 20; Lafayette Square Amoco, Inc. v. Indiana Dep't of Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007).

Taxpayer ("Consignee") protests the imposition of sales tax on certain watercraft and other boating equipment sold on consignment.

STATEMENT OF FACTS

Consignee is an S Corporation operating as a marina and serves as a consignee in the sales of watercraft, lifts, trailers, and other boating equipment. Consignee holds the consignor's property until it is sold and then receives a commission.

As a result of a sales and use tax audit for the years 2007, 2008, and 2009, the Indiana Department of Revenue ("Department") assessed Consignee additional sales and use tax, penalty, and interest. Consignee protested the imposition of tax on consignment sales and certain other sales that Consignee argued were exempt. A hearing was held and this Letter of Findings ensues. Additional facts will be provided as necessary.

I. Sales and Use Tax – Consignment Sales of Watercraft and Boating Equipment.

DISCUSSION

The Department's audit determined that sales tax was not collected on any of Consignee's consignment sales. Since Consignee did not collect and remit sales tax from its consignment buyers, the Department assessed Consignee sales tax, interest, and penalty.

As a threshold issue, all tax assessments are prima facie evidence that the Department's claim for the unpaid tax is valid; the taxpayer bears the burden of proving that any assessment is incorrect. IC § 6-8.1-5-1(c); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007).

Consignee argues that during the years at issue it had been told repeatedly by local Bureau of Motor Vehicle ("BMV") branches that it should not collect sales tax on consignment sales because it was not the owner of the watercraft that were sold in those transactions. According to Consignee, the BMV insisted to Consignee that the BMV collected the sales tax when the buyer of the watercraft titled and registered the watercraft at the BMV. Consignee provided the Department's auditor with written correspondence from the BMV in support of its position. Consignee also provided a copy of a check that it wrote to one of its consignment buyers to refund sales tax Consignee had collected from the buyer at the time of purchase. The buyer requested the refund from Consignee because the buyer had to double pay sales tax at the BMV when the buyer registered and titled the watercraft. It should be noted that Consignee was not assessed a negligence penalty because this was its first audit and because it had received conflicting information from the BMV.

Indiana imposes a sales tax on retail transactions made in Indiana. IC § 6-2.5-2-1(a).

IC § 6-2.5-1-2(a) defines a "retail transaction" to mean:

"Retail transaction" means a transaction of a retail merchant that constitutes selling at retail as described in [IC 6-2.5-4-1](#), that constitutes making a wholesale sale as described in [IC 6-2.5-4-2](#), or that is described in any other section of [IC 6-2.5-4](#).

Additionally, IC § 6-2.5-9-3(2) provides:

An individual who:

- (1) is an individual retail merchant or is an employee, officer, or member of a corporate or partnership retail merchant; and
- (2) has a duty to remit state gross retail or use taxes (as described in [IC 6-2.5-3-2](#)) to the department; holds those taxes in trust for the state and is personally liable for the payment of those taxes, plus any penalties and interest attributable to those taxes, to the state.

Accordingly, persons in the business of making sales on consignment are retail merchants receiving gross retail income that is subject to sales tax and are responsible for collecting that sales tax.

The Department also points Consignee to the four versions of Sales Tax Information Bulletin 20 that apply to the years at issue - October 2006 (20061101 Ind. Reg. 45060457NRA), May 2007 (20070523 Ind. Reg. 045070274NRA), September 2009 (20090930 Ind. Reg. 045090754NRA), and October 2009 (20091125 Ind. Reg. 045090898NRA) - which all state under Part IV that "[t]he sale of consigned tangible personal property is a

retail sale and the consignee must register as a retail merchant and must collect and remit sales tax."

Therefore, Consignee, as the consignee, unquestionably has a statutory obligation to collect and remit sales tax on the consignment sales.

Under IC § 9-31-3-1, "[E]very motorboat principally used on the waters of Indiana must be registered and numbered" with the Indiana Bureau of Motor Vehicles ("BMV"). But, there is no authority under Title 9 for the BMV to collect sales tax. The only tax the BMV is authorized to collect on watercraft transactions is the use tax. IC § 9-31-1-3 states, the BMV "shall receive payments of the use tax on watercraft that is required by [IC 6-2.5-3-2](#) and [IC 6-2.5-3-6](#)." (Emphasis added). Indeed, IC § 6-2.5-3-2(b) imposes use tax on the storage, use, or consumption of watercraft in Indiana if the property is acquired in an isolated or occasional transaction and is required to be titled, licensed or registered in Indiana, and if, according to IC § 6-2.5-3-4, sales tax has not already been paid on the acquisition of the watercraft or the buyer is otherwise exempt from sales and use tax.

IC § 6-2.5-3-6(d) authorizes the BMV to collect this use tax.

The circumstances at the BMV likely resulted from the particular ST-108 form (a dealer form) that Consignee filled out and gave to its customers. Those customers then in turn submitted to the BMV that form causing a data entry and payment processing conflict since Consignee in this instance was acting as a consignee and not a dealer who had owned the watercraft.

Consignee now understands that this does not alleviate its obligation to collect and remit to the Department the sales tax on these consignment transactions. Consignee should give each of its consignment buyers an invoice that identifies the buyer and shows sales tax was paid to consignee (i.e., Consignee) with a clear notation on the invoice that the item was a "consignment sale by [Consignee] on behalf of [seller] to [buyer]."

At the hearing, and in the interest of the equities of the case given the contradictory instruction given by BMV, Consignee was told that if it could show that the sales tax was paid by its purchasers at the BMV, then those transactions would be removed from the Audit's assessment of sales tax.

After the hearing, Consignee made diligent effort to document the sales tax status of the transactions assessed in the audit. Consignee subsequently provided the Department documentation for some of the assessed transactions that shows sales tax was paid at the BMV. A supplemental audit will review this documentation, in addition to other information available to the Department, and remove those newly documented transactions from the assessment. The remaining undocumented transactions, however, remain subject to sales tax.

FINDING

Consignee is sustained in part and denied in part. Consignee is sustained on the protested transactions to the extent Consignee and the Department have shown that sales tax was paid to the BMV. Consignee's protest is denied for the remaining protested transactions.

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